2004

Royene Aitken v. Utah Department of Human Services : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROYENE AITKEN,	:	
Petitioner,	:	
v.	:	Case No. 20040387-CA
UTAH DEPARTMENT OF HUMAN SERVICES,	:	
Respondent.	:	

BRIEF OF RESPONDENT

Appeal of the Final Decision of the Utah Career Service Review Board, an Administrative Agency of the State of Utah

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED BY RESPONDENT

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LIST OF ALL PARTIES

To the best of Respondent's knowledge, all interested parties appear in the caption of this Brief.

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STATEMENT OF JURISDICTION

The Decision and Final Agency Action of the Career Service Review Board (CSRB) was entered on April 16, 2004. R. 255-72. Royene Aitken's Petition for Judicial Review was filed on May 14, 2004. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(a) (2002) and Utah Code Ann. § 63-46b-14 (1997).

STATEMENT OF THE ISSUES

1. The CSRB did not abuse its discretion in granting the Department of Health (Department) an extension of time in which to file its Step 6 administrative brief.

This issue was considered by the CSRB in its Order on Request for Default (R. 129-32), its Denial of Grievant's Motion for Reconsideration or Interlocutory Appeal (R. 224-25) and its Decision and Final Agency Action. R. 256-57 n.1.

STANDARD OF REVIEW: This Court reviews an agency's interpretation of its own rules or regulations for abuse of discretion. Holland v. CSRB, 856 P.2d 678, 682 (Utah App. 1993).

2. The CSRB did not err in finding that there was factual support for the Department's decision that Royene Aitken had "abandoned her position" and the Department "had the discretionary option to terminate her employment." R. 267.

This issue was considered by the CSRB in its Decision and Final Agency Action. R. 263-67.

STANDARD OF REVIEW: Since this issue raises a question of general law, this Court reviews the "CSRB's conclusion for correctness, granting no deference to that agency's decision." Holland v. CSRB, 856 P.2d 678, 682 (Utah App. 1993).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES & RULES

All such provisions are set forth verbatim in Addenda to this brief.

STATEMENT OF THE CASE

On February 25, 2003, Royene Aitken was dismissed from her position as a registered nurse with the Utah State Hospital. She abandoned her position by failing to report to work, or communicate with her supervisor, for three consecutive work days. Aitken's grievance of her termination was denied by the Executive Director of the Department on March 19, 2003. R. 1. Aitken appealed this decision to the CSRB on March 27, 2003. R. 2.

A Step 5 Hearing on Aitken's grievance was conducted by a CSRB hearing officer on August 12, 2003. R. 276. In his August 29, 2003, Findings of Fact, Conclusions of Law, Decision and Order, the hearing officer found that Aitken had abandoned her position (R. 104-05) but determined that dismissal was inappropriate. Instead, he rescinded her termination and ordered the petitioner demoted one pay step retroactive to February 25, 2003. R. 107.

On September 3, 2003, the Department filed its notice of appeal to the CSRB from the hearing officer's decision.[1] R. 111. By letter dated September 4, 2003, the CSRB acknowledged receipt of the Department's timely notice of appeal. R. 112. This letter reminded the Department of its obligation to order a transcript of the Step 5 hearing and informed the Department's counsel that "[u]pon receipt of the transcript, the CSRB will issue a briefing schedule for the Step 6 oral argument before the Board." Id.

The Department ordered the transcript on September 8, 2003, (R. 116) and received it on October 8, 2003. R. 253. On October 10, 2003, the CSRB issued its briefing schedule. The scheduled set Monday, November 10, 2003 as the due date for the Department's brief. R. 117. On November 17, 2003, Aitken filed a default certificate with the CSRB. R. 120-21. Aitken asked for the dismissal of the Department's appeal because its brief had not been timely filed. The Department responded by stating that it had never received the briefing schedule that CSRB had promised to issue. R. 122-23,

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[1] While dated September 4, 2003, the notice of appeal was stamped received by the CSRB on September 3, 2003.

165-82. In its order of November 19, 2003, the CSRB denied the petitioner's request for default. The board explained that "there [was] substantial uncertainty as to whether counsel for the Department ever in fact received notice of the Board's October 10, 2003, scheduling order." R. 129. Instead of defaulting the Department, CSRB set a new briefing schedule for the appeal. Id.

On December 8, 2003, petitioner filed a motion for reconsideration or for interlocutory appeal with the CSRB, asking the board to revisit its denial of Aitken's request for a default judgment. R. 157-62. The CSRB denied this motion on January 27, 2004. R. 224.

On February 19, 2004, a day before the scheduled Step 6 hearing on the Department's appeal, Aitken filed a supplemental memorandum in support of her already denied motion for reconsideration.[2] R. 247-54. After hearing the Department's appeal (R. 277) the CSRB issued its Decision and Final Agency Action on April 16, 2004. R. 255-72. The board sustained the hearing officer's finding that Aitken had abandoned her position. R. 267. The CSRB also found that "[b]ecause the Grievant abandoned her position, the [Department] had the discretionary option to terminate her employment" and sustained Aitken's termination. Id. The board also denied the petitioner's request that a default judgment be entered against the Department for the third time. R. 256-57 n.1. In

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[2] Throughout her brief, Aitken mistakenly gives the date that this document was filed as January 26, 2004. Brief of Appellant Royene Aitken at 9, 12, 22. In the same manner, she mistakenly claims that the Step 6 hearing took place on January 27, 2004, instead of February 20, 2004, the date shown by the record. R. 255, 277.

doing so, the CSRB explained that it had no record of the scheduling order ever being faxed or emailed to the Department. "To the extent that the misunderstanding of briefing dates may be a result of Board procedure, the Board will ensure against recurrences by providing fax or mail notice of the briefing schedule to all parties." R. 257 n.1.

Aitken's Petition for Judicial Review was filed on May 14, 2004.

STATEMENT OF RELEVANT FACTS

The following facts are taken from the findings of fact of the hearing officer. Aitken has not challenged these findings.

1.a. Grievant was a nurse on the Children's Unit of the Utah State Hospital.
b. Grievant had been employed since November 1999.
c. I. Grievant's employment record apparently is (was) devoid of any problems up to the present circumstances. Grievant apparently received at a minimum "successful" ratings or higher in her job performance evaluations.
ii. Grievant was an apparently resourceful and dedicated employee having developed and coordinated some sort of animal therapy program on the children's unit. A daughter of Grievant was involved on occasion. (**SEE** "Findings of Fact" 1.d, immediately below).
iii. Based on apparent financial needs, Grievant has a history of working extensive overtime.
d. Grievant is a single mother with an apparent adult-age special needs child, Katie, at home.
2.a. At a Wednesday, February 19, 2003 meeting, Grievant was informed that she was being administratively transferred from the children's unit to the geriatrics unit.
b. Present at this meeting in addition to the Grievant were Francesco LePore, Diane Maciel and Chris Metcalf.
c. Grievant was informed that she was to report to her new work assignment the following day, Thursday, February 20, 2003, at 1800 hours (6:00 p.m.).
3.a. Grievant did not present herself for work on February 20, 2003, nor on the following two scheduled workdays of Friday, February 21, 2003, and Monday, February 24, 2003.

b. Grievant did not call in or "call off" within two hours in each instance in accordance with written hospital policy.

4. On February 25, 2003, Chris Metcalf, Nursing Administrator, delivered a letter to Mark Payne, Hospital Superintendent, informing him of the circumstances concerning Grievant requesting that Grievant be terminated based on abandonment of her position for failure to report to work as ordered.

5. On that same day, February 25, 2003, Superintendent Payne signed a letter to Grievant informing her that she was being dismissed for abandonment of her position in accordance with the Utah Department of Human Resource Management's (DHRM) rule R477-12-2 and informing Grievant of her appeal rights to the Executive Director of the Department of Human Services.

R. 102-03 (footnote omitted).

SUMMARY OF ARGUMENT

The CSRB informed the parties that it would issue a briefing schedule. Due to an error, the briefing schedule was not sent to the Department. When the error was brought to the attention of the CSRB, a one-month extension was granted the Department for the filing of its Step 6 brief. This extension did not violate the CSRB's rules and it did not substantially prejudice the petitioner.

The CSRB found, based on substantial evidence in the record, that the petitioner had abandoned her position with the Department by failing to show up for scheduled work shifts three times in a row. The CSRB also found that the petitioner had not complied with the Utah State Hospital's policy that required her to notify her supervisor each day that she would not be showing up for an assigned work shift. The petitioner claims that the evidence is contrary to the conclusions reached by the CSRB. But Aitken has failed to marshal the evidence that supports the CSRB's decision.

ARGUMENT

I. CSRB DID NOT ABUSE ITS DISCRETION IN INTERPRETING ITS OWN RULES TO PERMIT THE DEPARTMENT AN EXTENSION OF TIME TO FILE ITS STEP 6 BRIEF

It is undisputed that the CSRB informed the parties that it would establish a briefing schedule for the Step 6 appeal after the transcript of the Step 5 hearing was ready. R. 112. The CSRB found that it had failed to provide the Department's counsel with the briefing schedule, contributing to the Department's failure to file its brief on time. R. 129, 256-57 n.1. Because of this error on the part of CSRB, the Department was given a one-month extension in which to file its brief.

Petitioner claims that the late filing of a Step 6 brief requires the dismissal of the administrative appeal. She does not cite to any authority for this proposition other than Utah Admin. Code R137-1-22(2)(a). This rule provides that the appellant's brief will be due thirty days after the receipt of the transcript of the Step 5 hearing. This is the same time frame that was used by the CSRB in preparing its briefing schedule. But this rule only sets out the time frame for the filing of Step 6 briefs, it does not establish the sanction, if any, that should be applied if a brief is filed late. Indeed, the same rule sets out the grounds upon which an appeal may be dismissed.

> Dismissal of Appeal. Upon a motion by either party or upon its own motion, the board may dismiss any appeal prior to holding a formal appeal hearing if the appeal is clearly moot, without merit, improperly filed, untimely filed, or outside the scope of the board's authority.

R.137-1-22(3)(a).

The rule itself does not identify the late filing of a brief as a ground for dismissing an appeal. Three times the CSRB rejected Aitken's argument that the Department's appeal must be dismissed. The board instead granted a one-month extension for the filing of the Department's brief due to the board's error in failing to send the Department the briefing schedule and the Department's counsel's reliance thereon. Aitken asks this Court to read the CSRB's rule as mandating dismissal of a Step 6 appeal for the late filing of a brief, contrary to the way in which this rule has been interpreted by its draftsman, the CSRB. In making this argument, petitioner fails to recognize that an agency is entitled to deference in how it interprets its own rules.

In Holland v. Career Service Review Board, 856 P.2d 678 (Utah App. 1993) , this Court employed an abuse of discretion standard in reviewing a challenge to the Department of Human Resource Management's (DHRM) interpretation of its own regulation. "Thus, DHRM's application of that rule was reasonable and rational. Accordingly, we conclude that DHRM did not abuse its discretion in determining that Holland was not eligible for automatic reappointment under that rule." Id. at 682. In the same manner, CSRB's interpretation of its own rules is reviewed for abuse of discretion.

It is left to the discretion of the agency that authored a rule to interpret the same, so long as that interpretation is rational and reasonable. In E.M. v. Briggs, 922 P.2d 754, 757 (Utah 1996), the court held that a school board's interpretation of its own rules would be reviewed only to determine if it was arbitrary or capricious.

This Court, and the Utah Supreme Court, have repeatedly stated that an administrative agency's interpretation of its own rules is entitled to deference and will not be reversed unless it is arbitrary or capricious. Ashcroft v. Indus. Comm'n of Utah, 855 P.2d 267, 269-70 (Utah App. 1993) (agency's interpretation of its own rules will not be disturbed unless it "exceeds the bounds of reasonableness and rationality"); Concerned Parents of Stepchildren v. Mitchell, 645 P.2d 629, 633 (Utah 1982) (as a general proposition, an agency's interpretation of its own regulations is entitled to deference); McKnight v. State Land Board, 381 P.2d 726, 730 (Utah 1963) ("Courts usually will not override an administrative agency's interpretation of its own rules unless the interpretation is obviously arbitrary or erroneous").

This same issue was before the United States Supreme Court in Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982). McCluskey involved the single issue of whether the lower courts had correctly determined that the school board's construction of the word "drugs" in its rules as including alcoholic beverages was unreasonable. In reversing the lower courts, the Supreme Court explained:

> In any case, even if the District Court's and the Court of Appeals' views of § 11 struck us as clearly preferable to the Board's - which they do not - the Board's interpretation of its regulations controls under Wood v. Strickland. The Chairman of the Board testified that the Board had interpreted § 11 as requiring the suspension of students found intoxicated on school grounds for a number of years prior to respondent's suspension, and it is undisputed that the Board had the authority to suspend students for that reason. We conclude that the District Court and the Court of Appeals plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case.

Id. at 971.

The Supreme Court of Vermont followed the McCluskey decision in Lilly v. Vermont Headmasters Ass'n, Inc., 648 A.2d 810 (Vt. 1993). Lilly involved the proper interpretation of an eligibility rule of the Vermont Headmasters Association (VHA). The plaintiff claimed that the determination that he was ineligible to play high school hockey was invalid due to the VHA's misinterpretation of its policies. The Vermont Supreme Court, following McCluskey, reversed the lower court's substitution of its interpretation of the VHA rule for the VHA's own interpretation.

> The present appeal turns on the determination of whether the VHA has the final say as to the interpretation of its own rules, or if the court is authorized to override the VHA in interpreting a rule in a manner contrary to that expressly stated by the VHA itself.
> . . . .
> We disagree with the court's substitution of its own interpretation of the rule for that of the VHA where the rule in question was reasonable and related to a goal that the court itself found to be unchallenged.
> Even if the rule in question admits of two interpretations, the VHA, as an educational association entrusted with the regulation of extracurricular activities, is entitled to interpret its rule as it sees fit.

Id. at 811-12.

Far from being arbitrary or capricious, the CSRB's interpretation of its own rule is in keeping with how the appellate courts of Utah handle the filing of briefs. CSRB's rule, like Utah's Rules of Appellate Procedure, identifies an untimely notice of appeal as requiring dismissal, not other errors that are correctable.

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include

> dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

Utah R. App. P. 3(a)

The Utah Supreme Court has twice refused to treat the complete failure to file an appellate brief as constituting a default as urged by the petitioner. In Harrison v. Harrison, 23 Utah 2d 294, 462 P.2d 170 (1969), the court decided to consider the merits of the appeal, even though the appellee had failed to ever file a brief. The court rejected the notion that it should not reach the merits simply because one party was either unwilling or unable to file a brief. Harrison, 462 P.2d at 171.

In Fitzgerald v. Salt Lake County, 22 Utah 2d 128, 449 P.2d 653 (1969), the Utah Supreme Court again refused to treat the failure to file an appellate brief as a default. Instead, the court decided that it would impose a lesser sanction. It refused to permit the respondent to participate in oral argument and accepted the appellant's statement of facts in his brief as being unopposed. Fitzgerald, 449 P.2d at 654-55. The court again made it clear that it was not required to impose a sanction, but had the discretion to do so.

In the same manner, the failure to timely pay a filing fee is not jurisdictional. Such a failure can be remedied and does not mandate dismissal of the appeal. Dipoma v. McPhie, 2001 UT 61, ¶21, 29 P.3d 1225 (failure to timely pay a filing fee not a jurisdictional defect and would only require dismissal of the action if it were unreasonably delayed).

The CSRB's decision to grant a one-month extension for the filing of the Department's brief was not an abuse of discretion. Its rules do not mandate the dismissal of an appeal for the late filing of a brief. Given the CSRB's acknowledged errors that led to the problem (failure to send the Department the promised briefing schedule) it was not unreasonable to grant the extension.

Nor has Aitken shown that she was "substantially prejudiced." Her only claim of prejudice is that the CSRB did not default the Department and dismiss its appeal. She presented no evidence as to how she failed to obtain a full and fair consideration of the issues from the CSRB because of the one-month delay in the filing of the Department's brief.

> However, it should be noted that "the test for substantial prejudice is not, as [Petitioners] claim[ ], the fact that [they] received an unfavorable result; rather, the test is whether [Petitioners were] given full and fair consideration of the issues."

Road Runner Oil, Inc. v. Board of Oil, Gas and Mining, 2003 UT App 275, ¶27, 76 P.3d 692 (quoting Commercial Carriers v. Indus. Comm'n of Utah, 888 P.2d 707, 713 (Utah App.1994).

The minor delay caused by the one-month extension given the Department did not substantially prejudice the petitioner. It did not deprive her of a full and fair consideration of the issues raised on the appeal. Aitken has never claimed that it did. Instead, she claims prejudice only because of an unfavorable result, namely, the appeal

was not dismissed. She has failed to show substantial prejudice even if the CSRB's decision to grant the Department an extension were arbitrary or capricious.

II. THE CSRB DID NOT ERR IN FINDING THAT THERE WAS FACTUAL SUPPORT FOR THE DEPARTMENT'S DECISION TO TERMINATE THE PETITIONER

The CSRB is required to give deference to the decisions of those agencies who come before it. Utah Dep't of Corr. v. Despain, 824 P.2d 439, 442 (Utah App. 1991) (CSRB required to give deference to the personnel decisions of agencies).

> The CSRB's role in examining the Department's personnel actions is a limited one. The CSRB is restricted to determining whether there is factual support for the Department's charges against [a grievant] and, if so, whether the Department's sanction of dismissal is so disproportionate to those charges that it amounts to an abuse of discretion.

Career Serv. Review Bd. v. Utah Dep't of Corr., 942 P.2d 933, 942 (Utah 1997). Petitioner has not challenged the proportionality of the decision of the Department, but only whether there was factual and legal support for its decision that she had abandoned her position. Brief of Appellant Royene Aitken at 28-33.

Aitken has failed to marshal the evidence in support of the factual findings of the CSRB and cannot challenge those findings. A party challenging the factual findings of the CSRB has a duty to marshal the evidence.

> Furthermore, when challenging an agency action as not based upon substantial evidence, appellants have a duty to "marshal all of the evidence supporting the findings and show that despite the supporting facts, the [Board's] findings are not supported by substantial evidence."

Road Runner, 2003 UT App 275 at ¶10 (alteration in original); see also Covey v. Covey, 2003 UT App 380, ¶27, 80 P.3d 553 ("In order to successfully challenge the trial court's findings of fact, Almon 'must first marshal all the evidence in support of the finding[s] and then demonstrate that the evidence is legally insufficient to support the finding[s] even when viewing it in a light most favorable to the court below.'") .

Instead of marshaling the evidence supporting the finding of abandonment, Aitken relies instead on one witness's testimony concerning the affect of a Utah State Hospital policy. Without citing the actual language of the policy or the record, the petitioner simply argues that the facts support her interpretation of this policy due to her summary of Executive Director Arnold-Williams's testimony. Brief of Appellant Royene Aitken at 28-30. This same argument was made to the CSRB by the petitioner and rejected. The CSRB expressly stated that it was rejecting this argument because it was not supported by substantial evidence.

> The Absenteeism and Tardy Policy, §23, Utah State Hospital Operational Policy and Procedure Manual, generally referred to as the "call-off" policy, requires direct patient care workers to give telephonic notification at least two hours before a scheduled shift if the worker could not report for the shift. The policy also requires the employee to call in each and every day of such absence. The two-hour buffer is necessary for the Hospital to accommodate its mission to provide direct patient care. Order, Conclusions of Law, ¶6; Tr. 196-198.
>
> Grievant notes the plain language of the call-off policy to state its applicability to "illness and extreme emergency situations only." Grievant parses witnesses' hearing testimony to argue that the call-off policy does not apply when a worker will be absent for any reason other than an illness or emergency. Thus, Grievant asserts that she was not obligated to notify the Hospital that she did not intend to report for work, since her intended absence was not due to an "illness" or an "extreme emergency."

> We cannot accept Grievant's construction of the witnesses' testimony. It is not supported by substantial evidence and is not a fair reading of the hearing record. Grievant's proposed interpretation of the call-off policy leads to logical absurdity. For example, no call-off would be mandated if a worker learned that the fish were biting on a particular body of water, and the worker's love of fishing prompted a day of angling when the worker was scheduled to provide patient care. A more sensible reading of the policy is to take it at face value. Reading the policy in the context of the availability of previously scheduled vacation days, as well as the critical mission of the Hospital, it is apparent that patient care workers are expected to report for each and every scheduled shift, absent a sudden illness or an extreme emergency.

R. 263-64 (emphasis added).

An employee of the State of Utah abandons her employment by being absent from work for three consecutive working days without giving proper notification to their supervisor. Utah Admin. Code R477-12-2. The Utah State Hospital's policy provides express instructions on how a patient care giver, such as the petitioner, is to provide the necessary notification to their supervisor that they will not be showing up for a scheduled work shift:

> **Call off Procedure**
> 1. Direct care employees must call at least two hours before the start of their shift, allowing time to find a replacement. All other employees must call before the start of the shift.
> 2. The employee must talk directly to their supervisor or the scheduler. Leaving a message with a co-worker or having a family member call is not considered proper notification and will be considered a "no call / no show."
> 3. In the event an absence is greater than one day, the above procedure must be followed each and every day unless the employee has a doctor's note, at which point the employee is excused for the duration stated on the doctor's note.

Utah State Hospital Operational Policy and Procedure Manual, Chapter: Human Resources (HR), Section 23: Absenteeism and Tardy Policy. R. 294-95.

A "call off" is defined by the policy as "[t]he process of an employee calling work to report that he/she can not come to work for that scheduled shift. This is to be used for illness or extreme emergencies only." R. 294. The CSRB, and the Department, interpreted this policy as restricting an employee's ability to not show up for an assigned work shift to those cases involving illness or extreme emergencies. R. 294-95.

Petitioner's argument is that, because she was absenting herself from work for reasons other than illness or an extreme emergency, she did not need to call off. The only record support for this interpretation of the Hospital's call off policy, relied upon by the petitioner, are a few pages of the cross-examination testimony of Executive Director Arnold-Williams. Brief of Appellant Royene Aitken at 6.

As pointed out by the CSRB, there is evidence of record that conflicts with this testimony, including the redirect testimony of Ms. Arnold Williams. R. 276 at 57-60. It was the duty of the petitioner to marshal the evidence in support of the CSRB's findings. This she has failed to do.

Further, the Utah State Hospital is entitled to interpret its own policy. Briggs, 922 P.2d at 757 (interpretation of a rule is left to discretion of agency that authored it so longs as the interpretation is rational and reasonable); Holland, 856 P.2d at 682 (agency's interpretation of its own policy is reviewed for abuse of discretion and will be upheld if it

is reasonable and rational). Petitioner has failed to show that the "call off" policy's application to her was arbitrary or capricious.

The same is true of the petitioner's claim that she did not have to "call off" each day that she was to miss a work shift. The express language of the policy is to the contrary. The CSRB correctly upheld the Department's determination that Aitken had abandoned her position and that decision should be affirmed on appeal.

CONCLUSION

For the reasons presented above, the CSRB's final agency action should be affirmed.

RESPONDENT DOES NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Respondent does not request oral argument and a published opinion in this matter. The questions raised by this petition are not such that oral argument or a published opinion is necessary, though the respondent desires to participate in oral argument if it is held by the Court.

DATED this 3rd day of December, 2004.

BRENT A. BURNETT
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF RESPONDENT, postage prepaid, to the following this 31 day of December, 2004:

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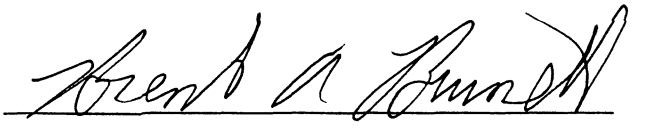


ADDENDUM "A"

Utah Admin. Code R137-1-22. The Board's Appellate/Step 6 Procedures.

(1) Transcript Production. The party appealing the CSRB hearing officer's evidentiary/step 5 decision to the board at the appellate/step 6 level shall order transcription of the evidentiary/step 5 hearing from the court reporting firm within ten working days upon receipt of acknowledgment of the appeal from the administrator.

(a) The appellant shall share an equal fee payment with the CSRB Office to the court reporting firm. Transcript production cost-sharing applies equally only to the appellant and to the CSRB Office. The CSRB Office receives the transcript original; the appellant receives a transcript copy.

(b) The respondent may inquire of the CSRB Office about obtaining a transcript copy, or may directly purchase a copy from the court reporting firm.

(2) Briefs. An appeal hearing before the board at step 6 is based upon the evidentiary record previously established by the CSRB hearing officer during the evidentiary/step 5 hearing. No additional or new evidence is permitted unless compelled by the board.

(a) The appellant in an appellate/step 6 proceeding must obtain the transcript of the evidentiary/step 5 hearing. After receipt of the transcript, the appellant has 30 calendar days to file an original and six copies of a brief with the administrator. Additionally, the respondent must be provided with a copy of the appellant's brief.

(b) After receiving a copy of the appellant's brief, the respondent then has 30 calendar days to file an original and six copies of a brief with the administrator. The appellant may file an original and six copies of a reply brief which addresses the respondent's brief.

(c) After receiving both parties' briefs, the administrator distributes the briefs and the CSRB hearing officer's evidentiary/step 5 decision to the board members.

(d) Each party is responsible for filing its original and six copies with the CSRB Office and for exchanging a copy with the opposing party.

(e) Briefs shall be date-stamped upon their receipt in the CSRB Office.

(f) The time frame for receiving briefs shall be modified or waived only for good cause as determined by the CSRB chair or vice-chair, or the administrator.

(3) Rules of Procedure. The following rules are applicable to appeal hearings before the board at the appellate/step 6 level:

(a) Dismissal of Appeal. Upon a motion by either party or upon its own motion, the board may dismiss any appeal prior to holding a formal appeal hearing if the appeal is clearly moot, without merit, improperly filed, untimely filed, or outside the scope of the board's authority.

(b) Notice. The board shall distribute written notice of the date, time, place, and issues for hearing to the aggrieved employee, to the employee's counsel or representative, to the appropriate agency official, to the agency's counsel or representative, and to the agency's management representative, at least five working days before the date set for the hearing.

(c) Compelling Evidence. The board may compel evidence in the conduct of its appeal hearings, according to Subsection 67-19a-202(3).

(d) Oral Argument/Time Limitation. The board grants up to 20 to 25 minutes to each party for oral argument. The board may grant additional time when deemed appropriate.

(e) Oral Argument Set Aside. If the board determines that oral argument is unnecessary, the parties shall be notified. However, the parties' representatives may be expected to appear before the board at the date, time, and place noticed to answer any questions raised by the board members.

(f) Argument or Memoranda. The board may require the parties to offer oral argument or submit written memoranda of law.

(4) The Board's Standards of Review. The board's standards of review based upon the following criteria:

(a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and also make new or additional factual findings.

(b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes according to the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.

(c) Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational

based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

(5) Appeal Hearing Record. The proceeding before the board shall be recorded by a certified court reporter, or in exceptional circumstances by a recording machine.

(6) Appellate Review. Upon a party's application for review of the CSRB hearing officer's evidentiary/step 5 decision, the board's appellate/step 6 decision is based upon a review of the record, including briefs and oral arguments presented at step 6, and no further evidentiary hearing will be held unless otherwise ordered by the board. Section 63-46b-10 of the UAPA is incorporated by reference.

(7) Remand. Until the board's decision is final, the board may remand the case to the original CSRB hearing officer to take additional evidence or to resolve any further evidentiary issues of fact or law with instructions or may make any other appropriate disposition of the appeal.

(8) Distribution of Appellate Decisions. The board's decision and order is issued on the date that it is signed and dated by the CSRB chair, vice-chair or another board member. After the board's appellate/step 6 decision is issued, it is distributed according to R137-1-8(3).

(a) The board's appellate decision shall be distributed to the aggrieved employee, the employee's counsel or representative, the appropriate agency official, the agency's counsel or representative, and to the agency's management representative. The board's appellate decision shall be final in terms of administrative review under these grievance procedures. The board may, at its discretion, release to the parties its determination orally prior to issuance of its official written decision.

(b) The board's appellate decision is binding on the agency that is a party to the appeal unless its decision and ruling is overturned, vacated, or modified resulting from an appeal to the Utah Court of Appeals.

(c) The board may affirm, reverse, adopt, modify, supplement, amend, or vacate the CSRB hearing officer's decision, either in whole or in part.

(9) Rehearings. The board does not permit rehearings.

(10) Reconsideration.

(a) Reconsideration requests of the board's appellate/step 6 decisions will be conducted pursuant to the provisions of Section 63-46b-13.

(b) Any request for reconsideration of a previously issued decision by the board is subject to the following conditions:

(i) Reconsideration requests must contain specific reasons why a reconsideration is warranted with respect to the board's factual findings and legal conclusions.

(ii) The board has discretion to decide whether it may reconsider any previously adjudicated matter.

(iii) The board only grants a reconsideration if appropriate justification is offered.

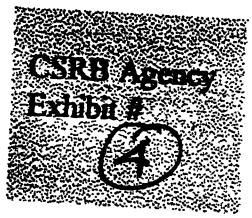
(iv) When the board agrees to the petitioner's request, the board's reconsideration response is in writing, with no further hearing or proceeding on the record, unless the board reopens the record or remands the case to the evidentiary/step 5 level.

(v) Any appeal from a board-issued reconsideration to the Utah Court of Appeals must be filed according to Section 63-46b-14(3)(a)of the UAPA.

(11) An Appeal to the Utah Court of Appeals.

To appeal to the Utah Court of Appeals, a party must file with the court within 30 calendar days from the date of issuance of the board's decision and final agency action according to Sections 63-46b-14 and 63-46b-16 of the UAPA, which are incorporated by reference. The dates of mailing, postmarking and receipt are not applicable to filing with the court.

(12) Transcript Fee. The party petitioning the Utah Court of Appeals for a review must bear all costs of transcript production for the appellate/step 6 proceeding. The CSRB Office may not share any cost for a transcript or transcription of the appeal hearing. The petitioning party should provide a copy of the appeal hearing's transcript to the responding party when an appellate/step 6 proceeding is transcribed.



R477-12. Separations.

12-1. Resignation.

Employees may resign by giving written or verbal notice to the appointing authority. In this rule, the word employee refers to career service employees, unless otherwise indicated.

(1) Agency management may accept an employee's resignation without prejudice when the resignation is received at least ten working days before its effective date.

(2) After submitting a resignation, employees may withdraw their resignation on the next working day. After the close of the next working day following its submission, withdrawal of a resignation may occur only with the consent of the appointing authority.

12-2. Abandonment of Position.

Employees who are absent from work for three consecutive working days and are capable of providing proper notification to their supervisor, but do not, shall be considered to have abandoned their position.

(1) Management may terminate an employee who has abandoned his position. Management shall inform the employee of the action in writing.

(a) The employee shall have the right to appeal to the agency head within five working days of receipt or delivery of the notice of abandonment to the last known address.

(b) If the termination action is appealed, management may not be required to prove intent to abandon the position.

12-3. Reduction in Force.

Reductions in force shall be required when there are inadequate funds, or a change of workload, or lack of work. Reductions in force shall be governed by DHRM business practices, standards and the following rules:

(1) When staff will be reduced in one or more classes, agency management shall develop a work force adjustment plan (WFAP). Career service employees shall only be given formal written notification of separation after a WFAP has been reviewed and approved by the Executive Director, DHRM or designee. The following items shall be considered in developing the work force adjustment plan:

(a) The categories of work to be eliminated, including positions impacted through bumping, as determined by management.

(b) A decision by agency management allowing or disallowing bumping.

(c) Specifications of measures taken to facilitate the placement of affected employees through normal attrition, retirement, reassignment, relocation, and movement to vacant positions based on interchangeability of skills.

ADDENDUM "B"

FILE COPY

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW BOARD

ROYENE AITKEN, Grievant and Respondent, v. UTAH DEPARTMENT OF HUMAN SERVICES, Agency and Appellant.	: : : : : : : : : : :	DECISION AND FINAL AGENCY ACTION Case Nos. 8 CSRB 75 (Step 6) 22 CSRB/H.O. 316 (Step 5)

On Friday, February 20, 2004, the Career Service Review Board (Board and CSRB) completed its appellate review of the above-entitled case with a hearing involving the parties and an executive session. The following Board members were present and heard oral argument at the hearing and deliberated in an executive session: Gloria E. Wheeler, Acting Chair, Joan M. Gallegos, and Felix J. McGowan. Ms. Royene Aitken (Grievant) was present and represented by Justin D. Heideman, Attorney at Law, who presented oral argument on Grievant's behalf with Patrick J. Ascione, Attorney at Law, also present at the Grievant's table. Assistant Attorney General Debra J. Moore represented the Department of Human Services (Department and DHS) with David Gardner, Human Resources Director for the Utah State Hospital, present as the Department's management representative.

AUTHORITY

The Board's statutory authority is set forth in UTAH CODE ANN. §§ 67-19a-101-408 of the State Employees' Grievance and Appeal Procedures Act, which is a sub-part of the Utah State Personnel Management Act (USPMA). The CSRB's administrative rules are published in the UTAH ADMIN. CODE R137-1-1 to -23. This Board hearing, or Step 6 appeal hearing, is the final step of administrative review in the State Employees' Grievance and Appeal Procedures for Ms. Aitken's appeal of the denial of her grievance. Both the Board's evidentiary/Step 5 and these appellate/Step 6 proceedings are designated as "formal adjudications" pursuant to R137-1-18(2)(a). Therefore, those provisions of the Utah Administrative Procedures Act (UAPA) pertaining to formal adjudications are applicable to the CSRB's Step 5 and Step 6 hearings. UTAH CODE ANN. §§ 63-46b *et seq.*

PROCEDURAL BACKGROUND

Grievant worked as a nurse on the Children's Unit of the Utah State Hospital in Provo, Utah. On February 19, 2003, Grievant was informed that she would be transferred to the Geriatric Unit on the following day. On February 20, 2003, Grievant did not report to work, nor did Grievant report for work on subsequent days. On February 25, 2003, the Agency informed Grievant that her employment was terminated based on abandonment of position.

Grievant appealed the termination to Robin Arnold-Williams, Executive Director, Utah Department of Human Services, who sustained the termination on March 19, 2003. Grievant then appealed to the CSRB. On Wednesday, August 12, 2003, a Step 5 evidentiary hearing was held before Hearing Officer Mark E. Kleinfield (Hearing Officer). At the hearing, Grievant was represented by Justin D. Heideman, Ascione, Heideman and McKay, L.L.C., Provo, Utah. The Utah Department of Human Services (Department or DHS) was represented by Assistant Attorney General Laurie L. Noda. Certified Court Reporter Kerry Sorensen, RPR, Thacker & Co., L.L.C., Salt Lake City, Utah, made a verbatim record of the proceedings.

On August 29, 2003, the Hearing Officer issued a written decision and order. *Aitken v. Utah Dep't of Human Services*, 22 CSRB/H.O. 316. The Hearing Officer ruled that the Agency met its burden to show that Grievant abandoned her position. Applying standards for a disciplinary separation, the Hearing Officer considered whether the Agency demonstrated that Grievant's dismissal was "to advance the good of the public service" or "for just cause," and ruled that the Agency had not met that burden. Thus, the Hearing Officer rescinded the termination of Grievant's employment with the Agency. Notwithstanding, the Hearing Officer concluded that Grievant knowingly violated an Agency policy, to wit, Absenteeism and Tardy Policy, Section 23, Utah State Hospital Operational Policy and Procedure Manual. As a penalty for the policy violation, the Hearing Officer ordered that Grievant be demoted one pay step, retroactively effective on February 25, 2003.

The Agency appealed the Hearing Officer's Decision and Order to the Board. Grievant filed a Motion for Reconsideration or Interlocutory Appeal, which was denied by the Board.[1] The Agency

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[1] At the beginning of the Board hearing, Grievant filed a Memorandum of Supplemental Controlling Authorities and Documents in Support of Grievant's Motion for Reconsideration or for Interlocutory Appeal. The Board finds that this memorandum constitutes a new motion and is untimely, and declines to consider it. The Board notes that the issue of the filing date of the Agency's brief has been previously addressed by

also asked the Board to dismiss Grievant's grievance for lack of jurisdiction, asserting that Grievant voluntarily resigned from her position.[2] The Board considered the Agency's appeal from the Hearing Officer's Decision and Order, and the Agency's Motion to Dismiss, at the hearing held Friday, February 20, 2004.

STANDARD OF REVIEW AND ISSUES ON APPEAL

A. STEP 5 EVIDENTIARY ISSUES AND RULING

The Step 5 hearing in the instant matter was held on August 12, 2003. The Board is authorized to conduct an evidentiary hearing by UTAH CODE ANN. § 67-19a-406. Because the Agency alleged abandonment of position, the Agency bore the burden of showing abandonment by substantial evidence. UTAH CODE ANN. § 67-19a-406(2)(a).

The Hearing Officer framed the issues as follows: first, whether Grievant abandoned her position; second, if Grievant did abandon her position, is termination the appropriate remedy, or should a lesser penalty be imposed. The Hearing Officer found that Grievant did abandon her position. He then considered the employment termination on the basis of abandonment as a "dismissal" and applied UTAH CODE ANN. § 67-19-18(1), which requires that a dismissal be to "advance the good of the public service" or for "just cause."

Five witnesses testified on behalf of the Agency, and four witnesses, including Grievant, testified on behalf of Grievant. One witness was qualified as an expert in the interpretation of Agency policies pertaining to notification of an intended absence from work. The Hearing Officer heard testimony concerning whether Grievant had provided notice that she would not work her shift on the appointed day, following the transfer to the Geriatric Unit. Further testimony addressed whether Grievant had "called-off," or notified the Agency that she would not report for work, on the

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the Board. The Board determined that the delay in filing the Agency's brief was due to excusable neglect. The Board then imposed a filing deadline for the Agency, which the Agency met. It appears from the Board's file that Grievant received a fax copy of the briefing schedule, but no fax copy was sent to the Agency. Though it has been the Board's usual practice to electronically mail a briefing schedule to agencies who subscribe to the Utah state email system, there is no record that the briefing schedule was sent by email to the Agency. To the extent that the misunderstanding of briefing dates may be a result of Board procedure, the Board will ensure against recurrences by providing fax or mail notice of the briefing schedule to all parties.

[2] An employee who voluntarily resigns from state employment may not file a grievance over termination of employment with the Board. UTAH CODE ANN. § 67-19a-401(6).

following days.

Following the hearing, the Hearing Officer entered his Findings of Fact and Conclusions of Law. The Hearing Officer found that Grievant did not appear at her assigned post on February 20, 2003, or on the following two scheduled workdays, Friday, February 21, 2003, and Monday, February 24, 2003. The Hearing Officer also found that Grievant was aware that she was obligated by policy to call and notify a supervisor on each day that Grievant did not intend to report for work. Thus, the Hearing Officer concluded that Grievant abandoned her position.

B. ISSUES ON APPEAL

The only appeal of the Step 5 Decision and Order was taken by the Agency.[3] The Agency first asks the Board to dismiss the grievance prior to considering the merits of the issues on appeal. The Agency asserts that Grievant actually voluntarily resigned from her position, thus depriving Grievant of the opportunity to file a grievance with the Board. The Agency cites to the words spoken by Grievant at the time that she protested her transfer to the Geriatric Unit, as well as Grievant's testimony in the Step 5 hearing, to support its contention that this is actually a case of voluntary resignation. Grievant counters that the Agency did not treat her statements at the time of the transfer as evidence of an intent to resign.

In the Agency's substantive appeal before this Board, the Agency challenges the Hearing Officer's analysis subsequent to his finding of abandonment of position. The Agency contests application of the standard of whether the employment termination is to "advance the good of the public service" or for "just cause." The Agency contends that standard applies only to "dismissals" from public employment, and that abandonment of position leads to an employment separation that cannot be characterized as a "dismissal."

The Agency further contends that the Hearing Officer erred in the substitution of a demotion for the employment termination. The Agency asserts that the Hearing Officer had no authority to modify the termination decision because this was not a dismissal. The Agency further complains that assuming the Hearing Officer could modify the termination decision, the Hearing Officer did

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[3] Much of Grievant's brief on the Step 6 hearing is framed as a challenge, in the vernacular of an appeal, of the Hearing Officer's finding that Grievant abandoned her position. Grievant never filed a notice of appeal of the Step 5 Decision and Order and is thus estopped from substantively challenging the finding of abandonment of position. *See In re Schwenke*, 494 Utah Adv. Rpt. 18, 2004 WL 330254 (February 24, 2004); *Vihn Do v. Utah Dep't of Human Services*, 6 CSRB 54 (1995) (declining to address due process claims not appealed from the Step 5 Decision and Order).

not give the requisite deference to the Agency's decision to terminate on the basis of abandonment of position.

C. THE BOARD'S APPELLATE STANDARD OF REVIEW

The Board applies the appellate standard mandated by UTAH ADMIN. CODE R137-1-22(4)(a)-(c) which reads:

> (a) The board shall first make a determination of whether the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard. When the board determines that the factual findings of the CSRB hearing officer are not reasonable and rational based on the evidentiary/step 5 record as a whole, then the board may, in its discretion, correct the factual findings, and/or make new or additional factual findings.
>
> (b) Once the board has either determined that the factual findings of the CSRB hearing officer are reasonable and rational or has corrected the factual findings based upon the evidentiary/step 5 record as a whole, the board must then determine whether the CSRB hearing officer has correctly applied the relevant policies, rules, and statutes in accordance with the correctness standard, with no deference being granted to the evidentiary/step 5 decision of the CSRB hearing officer.
>
> (c) Finally, the board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules, and statutes determined according to the above provisions.

Based upon this standard of review, the Board first determines whether the Hearing Officer's factual findings are reasonable and rational based upon the evidentiary record as a whole and whether those findings are supported by substantial evidence. Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Larson Limestone Co. v. State*, 903 P.2d 429, 430 (Utah 1995), quoting *First National Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990); *see also Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989). "It is more than a mere 'scintilla' of evidence and something less than the weight of the evidence." *Johnson v. Board of Review of Industrial Comm'n*, 842 P.2d 910, 911 (Utah App. 1992).

Next, the Board reviews the fact finder's decision to determine whether the Hearing Officer correctly applied "the relevant policies, rules, and statutes according to the correctness standard," giving no deference to the Hearing Officer's legal conclusions. The Board ultimately considers

whether the decision of the Hearing Officer is reasonable and rational based upon the Board's determination of the facts, together with the correct application of relevant State policies, rules and statutes considered by the Hearing Officer.

BOARD REVIEW AND ANALYSIS OF FACTS AND ISSUES ON APPEAL

I. WHETHER GRIEVANT VOLUNTARILY RESIGNED AND THE GRIEVANCE SHOULD BE DISMISSED

The Agency urges dismissal of the grievance on the grounds that Grievant's actions and spoken words indicate an intent to voluntarily resign. The Agency relies on statements made at the February 19, 2003, meeting at which Grievant was told of her impending reassignment to the Geriatric Unit. Specifically, the Agency asserts that the following cited dialogue evidences the intent to resign:

> Q. In the past have you ever gone to a boss and said, "I quit"?
> A. (Grievant): No.
> Tr. 307, lines 5-7.
> Q. And when you said that you couldn't and wouldn't work that shift, had you ever said that before?
> A. (Grievant): No.
> Tr. 308, lines 8-12.[4]

The Agency further cites to the action of Diane Maciel in escorting Grievant from the meeting site to her work place to retrieve some personal items, suggesting that an escort from the premises is consistent with a resignation. *See* Tr. 320, lines 20-25; Tr. 321, lines 18-21. Grievant counters that it was she who requested an escort from Ms. Maciel, because she was comfortable with Ms. Maciel. Tr. 320, lines 20-25. Neither interpretation of the event is clear from the record. However, there was no testimony from the witnesses that Ms. Maciel accompanied Grievant to retrieve personal items because Ms. Maciel believed that an escort was necessary or advisable, or because Ms. Maciel had been instructed by hospital officials to provide the escort. In her own

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[4] Grievant asserts that these words, and related similar statements, are "relevant to determine the issue of abandonment, but . . . unrelated to the question of whether Grievant resigned her position." We disagree. Grievant has not appealed the Step 5 decision that she abandoned her position. Notwithstanding, as explained below, we consider the issue of abandonment in the context of whether the Agency actually regarded Grievant to have abandoned her position, or to have voluntarily resigned. The two possibilities are dependent on many of the same facts.

testimony, Ms. Maciel confirmed Grievant's claim that Grievant asked Ms. Maciel to accompany her. Tr. 176, lines 17-21.

The Agency cites to several cases decided by the Board. Each is distinguishable. In *Bancroft v. Utah Dep't of Commerce*, J.H. 104 (1998), the grievant resigned in the face of impending termination after an investigation into his driver license status and suspected misuse of prescription medication. The grievant signed a letter of resignation, was accompanied to his home to retrieve a state-owned automobile, and required to surrender keys and official identification cards. Further, the grievant sent an agent to clean out personal effects from his desk on the following day. Not only were the indicia of resignation unequivocal, but the parties all understood that the resignation was in lieu of certain disciplinary termination.

In *Donald Larsen v. Utah State Prison,* 1 PRB 9 (1982), the Board found that the grievant had tendered a verbal resignation during a telephone conversation with his supervisor. The grievant discussed his intention of quitting, converting accrued compensatory and annual leave to a cash payment, and of signing a resignation letter. The grievant did not return to work, and shortly thereafter obtained other employment. In *Larsen*, the Board found that the grievant had tendered his resignation on November 13, and had failed to retract his resignation on the next working day, November 16. On December 2, the grievant's accrued annual leave was exhausted, and prison officials began the three day count for abandonment of position. In the interim, the grievant spoke with his former supervisor about "getting his old job back," as he was not happily employed in his new position. Prison officials notified the grievant that his employment was terminated and declined to rehire him. In ruling that the grievant had effectively resigned on November 13, the Board considered his inquiry to human resource staff concerning cash payment for accrued leave and accrued compensatory time, his removal of all of his personal items from the workplace a week before the November 13 telephone resignation, as well as the fact of the tendered resignation itself.

The factors present in the *Larsen* decision are not before the Board in the present case. The evidence of a verbal resignation consists of ambiguous statements by the Grievant, and the removal of personal items.[5] This cannot equate to the desk cleaning a week prior to an oral resignation,

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[5] Both in argument and in written memorandum, Grievant's counsel claimed that Grievant retrieved only some personal items, and had not turned in keys or identification badges, and that Grievant left some personal items at the work place. Though Grievant does not support this claim by citation to the record, we do not find the single element of removing personal items to be the sole, or even most persuasive, evidence

benefit inquiries, and unambiguous tender of resignation bolstered by new employment in *Larsen.*

In the final case cited, *Betty Jo Jensen, Ph.D., v. Utah State Office of Education,* J.H. 33 (1988), the issue was not whether the grievant had resigned or not, but whether the resignation was withdrawn in a timely manner. Though the grievant claimed that the resignation was involuntary, the strong weight of the evidence was contrariwise. In *Jensen,* there was a detailed written resignation stating that the resignation was voluntary, and requesting two months of administrative leave as part of the resignation document. The administrative leave had apparently been the subject of discussion and negotiation for some period prior to the written resignation. This is simply not the case in the instant matter and the *Jensen* decision is of no support to the Agency.

Though the Agency would now have the Board find that Grievant resigned, the Agency's conduct in the days and weeks following February 19, 2003, is illuminating. The Agency treated Grievant's action as an abandonment of position, not as a resignation. The Agency did not notify Grievant that her resignation had been accepted and was therefore effective. Rather, the Agency sent Grievant notice that it was exercising its prerogative under Rule 477-12-2 to terminate Grievant's employment. *See* UTAH ADMIN. CODE R477-12-2 (1) (Supp. 2003) (abandonment of position).

The Agency notified Grievant of her right to appeal the termination decision to the Executive Director of the Department of Human Services. This appeal right, articulated in UTAH ADMIN. CODE R477-12-2(1)(a), applies not to resignations, but to terminations due to abandonment of position. In fact, Grievant did unsuccessfully appeal her termination to the Agency Executive Director. The record illustrates that the Executive Director considered Grievant's circumstance an abandonment, and not a resignation. Tr. 35-37; 46-49.[6]

Grievant's words and actions, though susceptible to alternative interpretations, did not

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of a resignation in the cases cited by the Agency.

[6] Grievant argues that the Board should look to the Agency's present counsel's "lack of familiarity with the historical context of the case" as a key –and insufficient– basis for the Agency's request to dismiss the grievance. The Board notes that the Agency argues the notion of a voluntary resignation for the first time in its motion to dismiss. Notwithstanding, any party may assert a lack of jurisdiction by the Board over a grievance. It is axiomatic that lack of jurisdiction may be raised at any time during adjudicative proceedings. *State v. Valdez,* 65 P.3d 1191 (Utah 2003); *see also Varian-Eimac, Inc. v. Lamoreaux,* 767 P.2d 569, 570 (Utah App.1989) ("When a matter is outside the court's jurisdiction it retains only the authority to dismiss the [matter].").

constitute a voluntary resignation.[7] The Agency did not consider Grievant's action a resignation and did not act consistent with a voluntary resignation. The Agency complied with the procedure for addressing an abandonment of position. We hold that Grievant did not voluntarily resign her employment.

II. WHETHER THE HEARING OFFICER ERRED BY ORDERING DEMOTION IN LIEU OF TERMINATION

The Hearing Officer concluded that the facts of the case, measured against the applicable rule and Step 5 and Step 6 precedent, mandated a finding of abandonment of position. The Agency asserts that abandonment of position is not a "dismissal," and because there was no dismissal the just cause standard cannot apply to this case. Thus, the Agency asks the Board to sustain the termination of Grievant's employment. The Agency also contests the Hearing Officer's lack of deference to the Agency's discretionary decision to terminate Grievant's employment.

Though Grievant did not appeal the Step 5 determination that she abandoned her position, our task is to examine whether "the factual findings of the CSRB hearing officer are reasonable and rational according to the substantial evidence standard." UTAH ADMIN. CODE R137-1-22(4)(a) (Supp. 2003). Accordingly, we review the Hearing Officer's conclusion that Grievant abandoned her position to guide our determination of whether the just cause standard of UTAH CODE ANN. § 67-19-18(1) applies to the instant case.

Grievant advances two arguments counter to the conclusion that she abandoned her position. First, Grievant asserts that the call-off policy did not apply to her circumstances. Second, as previously noted, Grievant requests that her words "I quit" should be coupled with her warning to hire an attorney, as well as her claim that she could not work under the conditions of her transfer, and be interpreted as notice that she would not report for work for purposes of the call-off policy, but not be interpreted that she would not report for work because she quit.

The Absenteeism and Tardy Policy, § 23, Utah State Hospital Operational Policy and Procedure Manual, generally referred to as the "call-off" policy, requires direct patient care workers to give telephonic notification at least two hours before a scheduled shift if the worker could not

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[7] We note the Agency's citation to the rule that expressly bars submission of affidavits and additional evidence unless compelled by the Board. UTAH ADMIN. CODE R377-1-22 (2). In reaching the conclusion that Grievant did not resign, we rely only on the record of the Step 5 hearing. Thus, we need not address the Agency's request to strike Grievant's affidavit.

report for the shift. The policy also requires the employee to call in each and every day of such absence. The two-hour buffer is necessary for the Hospital to accommodate its mission to provide direct patient care. Order, Conclusions of Law, ¶ 6; Tr. 196-198.

Grievant notes the plain language of the call-off policy to state its applicability to "illness and extreme emergency situations only." Grievant parses witnesses' hearing testimony to argue that the call-off policy does not apply when a worker will be absent for any reason other than an illness or extreme emergency. Thus, Grievant asserts that she was not obligated to notify the Hospital that she did not intend to report for work, since her intended absence was not due to an "illness" or an "extreme emergency."

We cannot accept Grievant's construction of the witnesses' testimony. It is not supported by substantial evidence and is not consistent with a fair reading of the hearing record. Grievant's proposed interpretation of the call-off policy leads to logical absurdity. For example, no call-off would be mandated if a worker learned that fish were biting on a particular body of water, and the worker's love of fishing prompted a day of angling when the worker was scheduled to provide patient care. A more sensible reading of the policy is to take it at face value. Reading the policy in the context of the availability of previously scheduled vacation days, as well as the critical mission of the Hospital, it is apparent that patient care workers are expected to report for each and every scheduled shift, absent a sudden illness or an extreme emergency.

We now consider the Hearing Officer's conclusion that Grievant abandoned her employment position. The Hearing Officer found:

> Grievant was informed that she was to report to her new work assignment the following day, Thursday, February 20, 2003, at 1800 hours (6:00 p.m.). Grievant did not present herself for work on February 20, 2003, nor on the following two scheduled workdays of Friday, February 21, 2003, and Monday, February 24, 2003. Grievant did not call in or "*call-off*" within two hours in each instance in accordance with written hospital policy.

Order, Findings of Fact, ¶¶ 2 (c); 3.

Our review of the hearing transcript finds substantial evidence to support each fact cited in the preceding paragraph. Chris Metcalf testified that she gave Grievant direct instructions to report to work at the Geriatric Unit on February 20, 2003. Tr. 153-156. Francesco Lepore offered the same testimony. Tr. 90. Chris Metcalf testified that Grievant did not report for work on February 20, 2003, or the two following scheduled work days. Tr. 198-201. Grievant testified that she could have

called to state that she did not intend to report on any of the three work days. Tr. 336-337.

Grievant asserts that the words that she used on February 19, 2003, put her supervisors on notice that she would not report for work as long as she was scheduled for midnight shifts in the Geriatrics Unit. The Hearing Officer, who heard extensive testimony about the tone and tenor of the Grievant's statements, considered and rejected Grievant's claim that she had given the requisite notice that she would not report for work. We note that Grievant has argued that those same words must be considered in the context of Grievant's previous behavior, where she "had, on previous occasions, threatened to 'quit' when she was frustrated, but those threats were made when she was upset and did not reflect an actual intent to resign." Grievant's Memorandum in Opposition to Agency's Motion to Dismiss Grievance for Lack of Jurisdiction at 8. *See also*, Tr. 266-267. Notwithstanding, both Diane Maciel and Chris Metcalf appeared not to take Grievant's statement that she would not be at work on February 20, 2003, as more than an emotional outburst. Tr. 164-176; 180-183. Grievant characterizes her own words not as a clear and unambiguous indication that she would quit, but as an emotional threat to resign. Grievant's Memorandum in Opposition to Agency's Motion to Dismiss Grievance for Lack of Jurisdiction at 8.

The Hearing Officer sat as fact-finder; facing the witnesses and observing non-verbal communication, as well as the intonation and emotion of the spoken testimony. He was faced with weighing whether or not Grievant's words of February 19, 2003, gave notice of a sincere intent to not report for work as assigned on February 20, 2003, in light of the context and emotion of the meeting. The Hearing Officer heard conflicting testimony over not only the intent[8] of those words, but the actual words spoken.[9] We find that substantial evidence supports the Hearing Officer's determination that Grievant did not give the notice required by the Hospital's call-off policy, and consequently that Grievant had abandoned her position. Tr. 90, 153-156; 198-201; 336-337; Order, Findings of Fact, ¶¶ 2 (c); 3.

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[8] We note that UTAH ADMIN. CODE 477-12-2(1)(b) states that the Agency is not required to show Grievant's intent to abandon her position.

[9]Grievant states that she "did notify her supervisors without qualification that she would not show up to work the graveyard shift because of her disabled daughter's needs." Grievant does not cite to the record to support this argument. We note that the record is far from clear on whether Grievant discussed her daughter in the meeting where she stated that she would not comply with the new assignment and schedule. *See* Tr. 80-81; 154-157; 180-182.

We must now determine whether the Hearing Officer properly ordered demotion of Grievant as a remedy for abandonment of position. The Hearing Officer noted Grievant's stated personal challenges, both in working with geriatric patients and with working night shifts. The Hearing Officer considered the root cause of the employment termination as Grievant's failure to notify the Hospital and considered that failure in light of the just cause standard.

Career service employees may be "dismissed" only to "advance the good of the public service"or for "just causes . . . such as misfeasance, malfeasance or nonfeasance in office." UTAH CODE ANN. § 67-19-18(1) (2003). A "dismissal" is defined as "a separation from state employment ***for cause.***" UTAH ADMIN. CODE R477-1 (43). The language of UTAH CODE ANN.§ 67-19-18, demonstrates that the just cause statute is intended to apply only to disciplinary dismissals and demotions. *See* UTAH CODE ANN. § 67-19-18(3) (2003) (director to establish procedural rules for "disciplinary dismissals and demotions").

We hold that a "dismissal," as used in § 67-19-18(1), is a disciplinary action, not merely a separation of employment. The procedures for dismissing an employee are detailed in UTAH ADMIN. CODE R477-11. An entirely separate rule, UTAH ADMIN. CODE R477-12, addresses three non-disciplinary forms of employment separation, to wit, resignations, abandonment of position, and reduction of force. Each of these forms of employment separation are not "for cause" and thus are not "dismissals." Grievant was not "dismissed" from employment. Thus, the Hearing Officer erred in applying the just cause standard to the instant matter.

Because we find that Grievant's employment termination was not subject to the just cause standard, we hold that the Hearing Officer erred in finding an abuse of discretion by the Agency. Order, Conclusions of Law, ¶ 7. Though the decision to terminate employment following an abandonment of position is indeed discretionary, the discretion firmly rests with the Agency.[10] UTAH ADMIN. CODE R477-12-2(1). Even if the Board were to find the employment action imposed by a State agency to be harsh, we are limited in our power to substitute our judgment for the agency's decision. *Career Service Review Board v. Utah Department of Corrections*, 942 P.2d 933, 942 (Utah 1997) ("CSRB is restricted to determining whether . . . [an agency's] sanction of dismissal is

[10] We note that the hearing testimony was unambiguous concerning prior cases of abandonment of position within the Agency. The Agency has consistently exercised its prerogative to terminate employment in similar circumstances. Tr. 48-49.

so disproportionate to those charges that it amounts to an abuse of discretion); *Lunnen v. Utah Department of Transportation*, 886 P.2d 70, 72-72 (Utah App. 1994).

Though the decision to terminate employment should not be casually reached, the Board notes that Grievant failed to report for work involving direct patient care of institutionalized persons at a facility stressed by a shortage of professional nurses. This fairly fits within the long-recognized legal concept of nonfeasance of duty. *Bell v. Josselyn*, 69 Mass. 309, 311; 3 Gray 309, 311 (1855) ("Nonfeasance is the omission of an act which a person ought to do . . . ."). Certainly, it must be said that a licensed health care professional ought to report for caring for ill patients, absent a legitimate excuse or emergency. *See* UTAH CODE ANN. § 67-19-18(1)(b) (just cause for dismissal includes "nonfeasance in office").

DECISION

We find that Grievant did not resign her employment. Accordingly, we deny the Agency's motion to dismiss. The Hearing Officer's Conclusion of Law that Grievant abandoned her position is sustained. Because the Grievant abandoned her position, the Agency had the discretionary option to terminate her employment. The just cause analysis is not applicable to a termination for abandonment of position. We sustain the Agency's termination of Grievant's employment.

DATED this 16th day of April, 2004.

DECISION UNANIMOUS
Gloria E. Wheeler, Acting Chair
Joan M. Gallegos, Member
Felix J. McGowan, Member

Gloria E. Wheeler

Gloria E. Wheeler, Acting Chair
Career Service Review Board

RECONSIDERATION

A party may apply for reconsideration of this Step 6 formal adjudicative decision and final agency action by complying with UTAH ADMIN. CODE R137-1-22(10) and UTAH CODE ANN. § 63-46b-13, Utah Administrative Procedures Act.

JUDICIAL REVIEW

A party may petition for judicial review of this formal adjudication and final agency action pursuant to UTAH ADMIN. CODE R137-1-11, and UTAH CODE Ann. § 63-46b-14 and -16, Utah Administrative Procedures Act.

CERTIFICATE OF SERVICE

I certify that on this 16th day of April 2004, (1) I caused to be mailed, postage prepaid, the foregoing *Decision and Final Agency Action* in the matter of *Royene Aitken v. Utah Department of Human Services* to the following:

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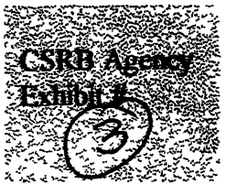
ADDENDUM "C"

Chapter: Human Resources (HR)
Section 23: Absenteeism and Tardy Policy



Policy

The purpose of the following policy is to maintain workplace efficiency, provide excellent inpatient psychiatric care and maintain a safe work environment, by defining acceptable team member attendance / tardy parameters. Failure to comply with the following policy may result in disciplinary action up to and including termination.

Definitions

Absences: A full scheduled day of work where the employee did not report to work with out prior authorization.

Tardy: Arriving to your assigned work area five minutes or more after your scheduled start time. Excessive tardiness will be dealt with using progressive discipline.

Excessive: Any absence or occurrence which is greater than the amount on the corresponding table:

Absences
2 in 1 month
4 in 3 months
6 in 6 months
9 in 12 months

Month: A rolling thirty day time period.

Occurrence: Each day absent from or tardy to work. The exception is for an illness with a valid doctor's note; the total concurrent days missed with a doctor's note will count as one occurrence.

Call Off: The process of an employee calling work to report that he/she can not come to work for that scheduled shift. This is to be used for illness or extreme emergencies only.

No Call / No Show: When an employee does not show up for their scheduled shift nor calls work to report their absence by the end of their scheduled shift. A no call / no show will be a non-paid day from work.

Job Abandonment: If an employee is a no call / no show for three consecutive days, it will be considered job abandonment by the employee and grounds for termination.

Doctor's Note: A doctor's note may be required for any of the following reasons: 1) History or pattern of absences. 2) An employee calls off on a day where the employee previously requested that day off, but was denied. 3) After three consecutive days off due to illness. 4) Anytime there is a reason to believe the employee is abusing sick leave.

Call off Procedure

1. Direct care employees must call at least two hours before the start of their shift, allowing time to find a replacement. All other employees must call before the start of the shift.

2. The employee must talk directly to their supervisor or the scheduler. Leaving a message with a co-worker or having a family member call is not considered proper notification and will be considered a "no call / no show."

3. In the event an absence is greater than one day, the above procedure must be followed each and every day unless the employee has a doctor's note, at which point the employee is excused for the duration stated on the doctor's note.

Implemented: 1-01